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ALEXANDER L. STEVAS,
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No. 84-1166

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

MALCOLM D. WEISS, D.O.,

Petitioner

v.

YORK HOSPITAL, THE MEDICAL AND DENTAL STAFF OF YORK HOSPITAL, S. PHILIP LAUCKS, M.D., HAROLD H. MacDOUGALL, M.D., IAN L. MacKENZIE, M.D., JOHN P. WHITELY, M.D., SAMUEL W. DEISHER, M.D., JACK A. KLINE, M.D., LOIS M. KUSHNER, M.D., IVAN L. BUTLER, M.D., GARY ARDISON, M.D., AND THOMAS L. BAUER, M.D.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT IN REPLY

I.

In the Petition for a Writ of Certiorari, we established that the Court of Appeals ruled that those excluded from a competitively essential facility must actually compete with the facility in order to claim that the foreclosure violated Section 2 of the Sherman Act. It was not enough, according to the Court, to prove that those who controlled access to the use of the facility competed with those excluded from it. In its brief in opposition to the petition, York Hospital quite literally admits that this decision represents an unprecedented departure from the principles established in such cases as *Terminal Railroad*, *Associated Press*, and *Gamco*[1] by conceding that Section 2 of the Sherman Act is violated whenever "those who control access to an essential facility deny their competitors access to that facility." Respondent's Brief in Opposition to the Petition for Writ of Certiorari (84-1166) (hereinafter "Respondent's Brief — No. 84-1166") at p. 13. By also admitting that the Court of Appeals found that "the York Medical Staff controlled York Hospital's staff privilege decisions", *Ibid.* at p. 14, n. 16, and used that control "to exclude" competing osteopathic physicians, *Ibid.* at p. 8, the defendant actually concedes that the Third Circuit's monopoly decision cannot be justified in any sense on its own terms. Thus, the Hospital is constrained to resort to three arguments external to those made in the opinion and not pressed in the Court below[2] to sustain the result reached by the Circuit Court, if not its reasoning.

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1. *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912); *Associated Press Co. v. United States*, 326 U.S. 1 (1945); and *Gamco, Inc. v. Providence Fruit & Produce Building, Inc.*, 194 F.2d 484 (1st Cir. 1952).

2. In order to demonstrate defendants' propensity to deviate from positions which they took in the Court of Appeals, plaintiff appended a copy of the entire brief on appeal which they filed in the Court of Appeals to his Brief in Opposition to the Petition for a Writ of Certiorari filed by the Medical Staff in this Court at No. 84-1187 (hereinafter "Brief in Opposition Appendix — No. 84-1187"). The entire discussion by York Hospital of the monopolization issue appears there at A-55-58.

First, defendant says, the question of whether there has been a violation of Section 2 under a unique facilities theory is not at issue because the jury was not given an essential facilities instruction, was not asked a special verdict question on whether the exclusion of osteopathic physicians violated Section 2 under the essential facilities doctrine and that there were no essential facilities findings by the District Court. Respondents' Brief — No. 84-1166 at pp. 14-15. Like so many of the representations made by defendants in this case, these representations are false.

The District Court submitted a special verdict question asking the jury whether York Hospital unreasonably exercised its monopoly power to exclude D.O.'s from its Medical Staff. Appendix to Plaintiff's Petition for a Writ of Certiorari filed at No. 84-1166 (hereafter "Appendix to Petition — No. 84-1167") at A-100. To guide the jury in answering this question, the Court gave an essential facilities instruction, charging the jury that it was an unreasonable exercise of monopoly power to foreclose access to unique facilities without substantial justification. Defendants expressly recognized as much when their counsel stated to the District Court:

> "Your Honor charged that if the jury concluded that York Hospital has unique facilities and market power, then they would find that there was an abuse of monopoly power if plaintiff and plaintiff class were denied access to these facilities unfairly or unreasonably."

See Reply Brief App. — No. 84-1167 at A-20.[3] Under these circumstances, the jury's conclusion that York Hospital unreasonably exercised its monopoly power plainly represents a determination adverse to it under the essential facilities instructions given by the District Court. Appendix to Petition — No. 84-1166 at A-100.

Finally, the District Court itself made specific findings of fact that York's facilities were unique and competitively

3. Unlike the defendants, we have reproduced here in Appendix form all portions of the record on which we rely. Citation to the Appendix to this Reply Brief will be designated as "Reply Brief App. — No. 84-1187."

important and thus qualified for treatment under the essential facilities doctrine:

> "York Hospital has a number of unique services and facilities not available to patients and physicians at any other hospital within the York Medical Service Area.
>
> As a result of York Hospital's possession of unique services and facilities, osteopathic physicians lacking staff privileges at York Hospital have been required, if they desire to have their patients treated locally, to refer their patients to allopathic physicians who are members of the York Hospital Medical and Dental Staff for treatment at York Hospital."

Ibid. at pp. A-102-103.

On appeal to the Third Circuit, defendants did not challenge the District Court's essential facility instructions, the sufficiency of the evidence to support the jury's conclusion under these instructions, or the sufficiency of the evidence to support the independent findings by the District Court that York was an essential facility. See fn. 2, *supra*. Despite this, defendant posits that it could not be found an essential facility because: (1) "the uncontradicted testimony" was that the services and facilities available at York Hospital but not at Memorial "are also available elsewhere in York County," (2) plaintiff's economist, Dr. Frech, testified that all of these services were not available at Memorial Hospital simply because Memorial "just chose not to provide them," and (3) "it does not appear that the exclusion of osteopaths from York Hospital has inflicted a severe handicap on osteopaths." Respondent's Brief — No. 84-1166 at pp. 4 & 15. In making these assertions, defendant has departed from the arena of advocacy and entered the world of deceit.

The testimony on both sides was that York Hospital offered a number of sophisticated services and facilities which were not offered by the only other hospital in the relevant market, Memorial.[4] These included computed ax-

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4. The jury found that the relevant geographic market was not York County but the York Medical Service Area. Appendix to Petition

ial tomography, therapeutic radiology, open heart surgery, cardiac catheterization, neonatal intensive care, monitored stroke treatment, burn care, cardiopulmonary laboratory, electroencephalography, and infusion aspiration. Reply Brief App. — No. 84-1166 at A-8-9; Appendix to Petition — No. 84-1166 at A-10. Defendants' own expert testified, in agreement with plaintiff, that by virtue of these services York Hospital competed in a "tertiary care submarket" in which no other hospital in the market provided services:

> Q. Dr. Inman, based upon your discipline, do you have an opinion, to a reasonable certainty, as to what the relevant product or product markets may be in these case?
>
> A. [W]e are considering really three levels of products. . . . [T]here is a third level of care in the literature and in the professional hospital administration literature called tertiary care and it involves for the most part the intensive care treatment of patients. It's the most sophisticated kind of treatment. It will involve radiation therapy for complicated cancers, chemotherapy for complicated cancers, intensive care treatment, open heart surgery. It is the most sophisticated kind of medical care and will involve what are called subspecialist physicians.
>
> * * *
>
> Q. And how about the tertiary area, does Memorial provide the tertiary level of services?
>
> A. No.
>
> Q. Does York?
>
> A. Yes.

Reply Brief App. — 84-1166 at A-18-20.

Although Dr. Frech did testify that there were certain non-tertiary care services, such as pastoral care, speech

NOTES *(Continued)*

— No. 84-1166 at A-100. On appeal, defendants did not challenge this finding. See Appendix to Brief in Opposition — No. 84-1187 at A-11-14. In its Brief in Opposition here, York Hospital admits that the only two hospitals in the York Medical Service Area, the relevant market, were York Hospital and Memorial Hospital. See Respondent's Brief — No. 84-1166 at p. 3.

therapy, and audiology, which were not provided by Memorial Hospital simply "by choice," *Ibid.* at A-14-15, it is dishonest to suggest, as York Hospital does, that this was the reason that Memorial did not provide services in the sophisticated tertiary care market. To the contrary, Dr. Frech was unequivocal that Memorial's entry into that market was blocked by the local administration of the health planning laws, subject to considerable influence by York Hospital, which prevented it from duplicating the sophisticated services and facilities offered by its dominant competitor. Reply Brief App. — No. 84-1166 at A-9-13. Indeed, in contrast to its patent misrepresentation of Dr. Frech's testimony here, York Hospital emphasized in its Brief before the Court of Appeals that it was Frech's opinion, and that of the economic testimony in general, that the health planning laws made it impossible for any provider in the market to duplicate York's tertiary care facilities. As defendants said there:

> "Frech testified that the special services or facilities available at York had resulted because federal and state regulations, designed to keep health care costs down, allocated certain services and facilities among institutions to prevent duplication."

Respondent's Brief — No. 84-1187 at p. A-57. Both the District Court and the Court of Appeals plainly adopted this conclusion. Appendix to Petition — No. 84-1166 at A-10.

Finally, it cannot be and was not disputed that the foreclosure of access to York's facilities was not merely a "severe handicap" to osteopathic physicians, but engendered a total disability to participate in the provision of services in the tertiary care submarket with an accompanying dramatic loss of patients, income, goodwill and prestige. Appendix to Petition — No. 84-1166 at A-11-12.

Third, despite the Court of Appeals explicit conclusion that York's M.D. Staff controlled access by competing physicians to the Hospital's unique and competitively important facilities, the Hospital claims otherwise. It asserts that the evidence is "unequivocal" that both generally, with re-

spect to the admission of osteopathic physicians and with respect to the application of Dr. Weiss, staff privilege decisions were made exclusively by the Hospital's Lay Board and not controlled by its Medical Staff. The Hospital claims that this was, in fact, determined by the jury's verdict that the Medical Staff did not have the power to exclude competitors from the market. Brief in Opposition — No. 84-1166 at pp. 6 & 14.

Defendants' interpretation of the jury's verdict is thoroughly warped. A jury conclusion that the Medical Staff did not have sufficient market power to raise prices and exclude competition in the relevant market, under instructions defining these as the essential elements of "monopoly power," would hardly be tantamount to a factual finding that the Staff did not control medical privileges at York Hospital. Moreover, even as to market power, the jury's verdict is contrary to that claimed by defendants. The defendants requested that the jury be instructed that for purposes of the antitrust laws the Hospital and the Medical Staff must be considered a single, indivisible entity. These instructions were given by the District Court. *Ibid* at A-20. Thus, the jury was legally precluded from distinguishing between the market power of the Hospital and that possessed by the Medical Staff. Consequently, its conclusion that York Hospital had the power to exclude competition necessarily embraced the Staff as well. Finally, the special verdict question which went directly to the issue of who controlled access to York Hospital's facilities was not the one concerning market power but the one which asked which defendant, if any, acted to deny or impede fair, reasonable and equal access by osteopathic physicians to York Hospital. On this question, the jury found that it was the Medical Staff. Appendix to Petition — No. 84-1166 at A-99.

The Hospital's representations concerning the evidence on the issue of who controlled privilege decisions are as disingenuous as its view of the verdict is warped. To support the notion that it was the Hospital's "Lay Board" and not its Medical Staff which made staff privilege decisions at York Hospital, the Hospital does not point to a sin-

gle item in the trial record.[5] Rather, it generously indulges in citation to federal and state regulations and the accreditation standards of the JCAH and makes allusions to some scant pretrial materials. However, at trial defendants did not show that they were subject to the federal and state regulations to which they point, let alone demonstrate that they complied with those regulations. The Hospital did not even prove that it was accredited by JCAH, let alone show its standards or compliance with them. And the pretrial materials on which it relies were so thoroughly impeached, that defendants did not proffer them at trial.

When plaintiff made these charges in response to an identical claim of non-control of staff privilege decisions made by the Medical Staff in its Petition for a Writ of Certiorari, defendant's counsel filed a Reply Brief in this Court stating:

> "Contrary to Weiss' contention, the record is replete with evidence that York Hospital's Lay Board made all staff privilege decisions."

Reply Brief — No. 84-1187 at p. 6, n. 9. In support of this statement, counsel pointed to 15 pages in the trial record which they did not reproduce for this Court: 3811a, 5956a, 5959a-5970a and 5979a-5980a. *Ibid*. To demonstrate the defendants' lack of candor with the Court, we have reproduced these pages in the Appendix to this Reply Brief. See Reply Brief App. — No. 84-1166 at A-6-7, A-21, A-22-28. Incredibly, all but one do not even refer to the Board's participation in the staff credentialing process.[6] Moreover,

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5. The trial record begins the Appendix on Appeal at p. 3437a. The references to the proceedings in the lower court which the Hospital makes in its discussion of the relationship between it and the Medical Staff are to portions of the Appendix appearing before that page.

6. This is not the only instance where defendants' counsel took advantage of the fact that the full record was not present in this Court in order to create a false appearance of support for a proposition of fact. For example, at page 8 of the Medical Staff's Reply Brief filed at No. 84-1187, they cite 11 different portions of the record for the proposition that procompetitive justifications for the Medical Staff's anticompetitive conduct were "of record." Each of these citations, however, refer

they each provide overriding confirmation for the representation which we made in our Brief in Opposition to the Medical Staff's Petition for a Writ of Certiorari that regardless of what defendants might have shown in the abstract and what allocation of responsibility should or might exist at some hypothetical hospital, what *this* trial record shows, without contradiction is that *this* Hospital Board delegated all decision-making responsibility for granting staff privileges to the Medical Staff.

The materials cited by the Medical Staff's Reply Brief show that the Staff adopted criteria for granting staff privileges and determined the procedures for ascertaining compliance with those criteria which became "binding on the Board of Directors." See Reply Brief App. — No. 84-1166 at A-22-28. The procedures adopted by the Staff delegated the entire credentialing process exclusively to committees of the Medical Staff. *Ibid*. They also show that the only responsibility the Board retained with respect to the process was determining whether the Staff had followed its own procedures, however anticompetitive, capricious or unreasonable. See Reply Brief App. — No. 84-1166 at A-29, A-2-3. The Board abdicated even this limited responsibility to a joint committee composed of members of the Board and the Medical Staff and simply rubber stamped the decisions of this Medical Staff Committee. As the Hospital's Vice President for Medical Affairs testified:

> "The Board of Directors at York Hospital operates by committees and the endorsement by the Medical Staff Committee virtually amounts to an endorsement by the Board."[7]

NOTES *(Continued)*

only to material assembled in Dr. Weiss' application file. They do not in any sense purport to offer any economic or other procompetitive rationale for distinguishing between M.D.s and D.O.s, the discrimination found by the lower courts here.

7. See Reply Brief App. — No. 84-1166 at A-7. In its Reply Brief at No. 84-1187, the Medical Staff claims that this testimony refers to "a committee of the York Hospital Board of Directors, not a committee of the York Medical Staff." See Reply Brief — No. 84-1187 at p. 6, n. 10. This claim is false. Dr. Bacastow testified that this Committee was a

With regard to the specific issue of osteopathic physicians gaining access to the use of York Hospital's facilities, the evidence is without contradiction that the Hospital completely capitulated to the exclusionary interests of its Medical Staff. Although the Hospital determined in 1974 to amend its charter to permit the admission of osteopathic physicians, the Hospital's President explained that:

> "The Board of Directors in enacting the change of the charter felt that it was very important that a change of the charter would not indicate to the Staff that they had to make a change in the bylaws [which barred D.O.s from its Staff] but that it is something the Medical Staff themselves should evaluate and make a decision."

The materials cited by the Medical Staff's Reply Brief substantiate this proof. See Reply Brief App. — No. 84-1166 at A-6-7. Thus, the Board expressly delegated to the Medical Staff final authority to exclude osteopathic physicians from the Hospital in furtherance of their own economic interests.

Finally, with regard to the decision on Dr. Weiss' individual application for privileges, the trial record, including the materials cited in the Medical Staff's Reply Brief, shows that in connection with that application, the Board followed its policy to simply rubber stamp the staff privilege decisions made by the Staff. See Plaintiff's Brief in Opposition — No. 84-1187 at p. 6.

Thus, it is beyond peradventure that the record and the jury's verdict support the conclusion that York Hospital was an essential facility with monopoly power, that the M.D.s on its Medical Staff had control over access by their competitors to that facility, and that they used that control to foreclose access to their competitors. Since defendants concede that this is a violation of Section 2 of the Sherman Act, certiorari is appropriate to review the Third Circuit's unprecedented contrary conclusion.

"joint Medical Staff Board of Directors Committee." See Reply Brief Appendix — No. 84-1166 at A-7.

II.

In opposition to the Petition, York Hospital also contends that there is no split of authority among the circuits on whether a monopolist has a duty to deal with a non-competitor.[8] Plainly, the appellate cases demonstrate a distinct split of authority. In contrast to holdings in the Second, Fourth and Sixth Circuits, the D.C. Circuit found in *Hecht* that a refusal by a stadium lessor to deal with a football team with whom it did not compete violated Section 2. *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977). In *LaPeyre*, the competitive relationship between the plaintiff and the defendant was found irrelevant by the Fifth Circuit. *LePeyre v. FTC*, 366 F.2d 117, 120-21 (6th Cir. 1966). And in *Home Placement* and *Byars*, the competitive relationship between the plaintiff and the defendant was so attenuated that it lacked any legal significance in the decisions by the First and Sixth Circuits. *See, Home Placement Service, Inc. v. Providence Journal Co.*, 682 F.2d 274, 281 (1st Cir. 1982) and *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 853 & 860 (6th Cir. 1979).

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition for a Writ of Certiorari, it is respectfully submitted that the Petition should be granted.

Respectfully submitted,
Arnold Levin
Counsel of Record

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8. The remaining arguments made by the Hospital are so insubstantial as to require no reply here.

APPENDIX

[1542a]*

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MALCOLM WEISS, *Plaintiff,*	:	CIVIL ACTION NO. 80-0134
	:	COMPLAINT FILED 2/6/80
v.	:	
YORK HOSPITAL, et al. *Defendants.*	:	(JUDGE MUIR)

AFFIDAVIT OF
MERLE S. BACASTOW, MD

COMMONWEALTH OF PENNSYLVANIA	:	
	:	ss
COUNTY OF YORK	:	

MERLE S. BACASTOW, M.D., being duly sworn according to law, deposes and says:

1. I am, and have been since May 1972, Vice President-Medical Affairs of York Hospital, and as such am authorized to make this Affidavit in support of the defendants' Motion for Summary Judgment. I am a licensed physician in the Commonwealth of Pennsylvania.

* * *

[1554a]

42. On March 13, 1979, the Hospital Board of Directors voted to deny Dr. Weiss Staff privileges at the Hospital. Present and voting at that meeting were Directors Angelo, Appell, Brenneman, Erdos, Gohn, Holliday,

*Throughout this Appendix, these four digit numbers followed by "a" designate the pages where the cited material appears in the Appendix on Appeal filed in the Third Circuit.

Johnson, Krout, McCabe, McIntosh, Pfafflin, Smith, Snyder, Thornton, Warner, and Chairman Cohen. See Exhibit F, Minutes of Special Meeting of the Board of Directors on March 13, 1979.

* * *

[1690a]

Exhibit f

BOARD OF DIRECTORS
MINUTES OF SPECIAL MEETING — 3/13/79

The meeting began at 4:07 P.M. in the new Administrative Conference Room with Chairman Donn I. Cohen presiding. Also attending were Directors Angelo, Appell, Brenneman, Erdos, Gohn, Holliday, Johnson, Krout, McCabe, McIntosh, Pfafflin, Smith, Snyder, Thornton and Warner; Administration: Messrs. Keiser, Miller, Saff and Dr. Bacastow; Attorneys Springer, Brown, Markowitz, Tarlow and Malcolm Weiss, D.O. A quorum for the meeting was present.

Chairman Donn I. Cohen opened the Special Board meeting to hear the appeal of Dr. Malcolm Weiss for privileges to the Medical-Dental Staff of York Hospital. Mr. Cohen introduced Attorneys Springer and Brown serving as legal counsel for the Medical Staff and Hospital, and Attorneys Markowitz and Tarlow representing Dr. Weiss. Chairman Cohen indicated that in accordance with the By-Laws of the Medical-Dental Staff of York Hospital it is the responsibility of the Board of Directors to serve as an appellate review body to hear the appeal of Dr. Weiss. Chairman Cohen advised the Board that Directors may ask questions of either legal counsel during the proceedings; however, Directors should refrain from making statements expressing an attitude or opinion. Both legal counsels were allotted thirty minutes to present their oral summaries, starting first with Attorney Markowitz. Attorney Markowitz was to be allotted fifteen additional minutes following the summary of the Medical Staff's legal counsel as a rebuttal. Following Attorney Markowitz's closing remarks, the coun-

sels for both parties were excused and the Board met in closed session. Both counsels indicated their approval for this procedure as outlined by Chairman Cohen.

* * *

[1693a]

Following this discussion, it was the consensus of the Board to move on Dr. Weiss' appeal at the present time.

(4) Action

Action Upon a motion duly made, seconded and unanimously approved, it was:

> RESOLVED, Dr. Malcolm Weiss has received due process and has thereby been afforded fair and adequate hearing procedures.

Action Upon a motion duly made, seconded and approved by a vote of 14 in favor, 0 opposed, and 2 abstentions, it was:

> RESOLVED, the Board of Directors affirms the recommendation of the Executive Committee and Judicial Review Committee of the Medical Staff for denial of privileges to Dr. Malcolm Weiss.

Chairman Cohen requested that Administration attain in writing a legal opinion from the Hospital's counsel stating that the completed proceedings have been in keeping with the Medical Staff By-Laws as well as in accordance with the Laws of the Commonwealth of Pennsylvania and further stating that the decision of the Executive Committee and Judicial Review Committee of the Medical Staff was not erroneous, capricious, or unreasonable.

There being no further business, the meeting adjourned at 6:50 P.M.

Mrs. Vincent McCabe
Secretary

Discussion

1. Oral Summary of Attorney Lewis Markowitz
2. Oral Summary of Attorney Springer
3. Rebuttal
4. Action

[3437a]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MALCOLM WEISS,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL NO. 80-0134
	:	
YORK HOSPITAL, et al.,	:	
	:	
Defendants.	:	

August 11, 1982
Williamsport, Pa.

BEFORE: HONORABLE MALCOLM MUIR and a jury

TRIAL TRANSCRIPT

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[3810a]

Direct Examination of Merle S. Bacastow:

Q. Up until 1974, Doctor, is it true that the York Hospital as a corporation prohibited the admission of osteopaths to its medical and dental staff.

A. Yes.

Q. Do you know what the reasons for that were. What were the reasons for that if any, Doctor.

A. That was in the charter. That is the way the charter was originally written. I don't know the reasons why the charter was written the way it was.

Q. And in 1974 the charter was changed, is that correct.

[3811a]

A. Yes.

Q. Do you recall when in 1974 the Charter was changed. Was that around the end of the year towards October or November.

A. That's my recollection, yes.

Q. And thereafter did the staff permit osteopaths to apply for staff privileges at York Hospital.

A. Yes.

Q. Did they do so immediately upon Charter change or was there some delay.

A. It required changing the medical staff By-Laws and the By-Laws did not permit the admission of osteopathic physicians at that time.

Q. The medical staff By-Laws that you're referring to; are those the central document under which the staff organizes itself and governs itself. Is that true or not.

A. Yes.

Q. Where does ultimate responsibility for the granting or denial of staff privileges reside. Does it reside in the Board of Directors of the hospital.

A. Yes.

Q. And they are the authority with regard to granting or denial of staff privileges, is that correct, at York Hospital.

A. Upon the recommendation of the staff, yes.

[3812a]

Q. But they are the authority.

A. Yes.

Q. And has that always been true at York Hospital since you've been there in 1972.

A. Yes.

Q. If the Charter had been changed to permit — the Charter of the hospital itself — had been changed to permit the hospital to accept osteopathic physicians on the staff in October or November of 1974, why did this hospital have to wait until the staff changed their By-Laws to permit osteopathic physicians on the staff.

A. May I have that question again. I somehow lost it.

Q. If the authority with the power and responsibility to grant staff privileges as the Board of Directors of the corporation known as York Hospital, why would York Hospital not grant staff privileges until its staff changed their By-Laws to permit osteopathic physicians on the staff. Was there a reason.

A. I'm not sure I can answer that question. My thought is the medical staff responsibility to recommend physicians for appointment. And the Board would not act without recommendation from the staff.

* * *

[3821a]

Q. Now, let's go on in the setting out of the application process: if the Executive Committee recommends privileges, where does it go.

A. It goes to a joint medical staff Board of Directors Committee known as the Medical Affairs Committee.

Q. What is their job with regard to staff privileges.

A. Again an additional review and Board participation in granting of privileges. The Board of Directors at the York Hospital operates by committees and the endorsement by the medical staff committee virtually amounts to an endorsement by the Board, not always but at least that is a

board committee that serves as a joint committee between the medical staff and the Board.

Q. Are you aware of any instances in which the recommendation of the Medical Executive Committee to approve staff privileges was overturned by the Medical Affairs Committee.

A. Not that I recall at this moment.

Q. And from the Medical Affairs Committee an approved application goes right on up to the Board who grants the final approval I would assume.

A. If they approve it, yes.

[3864a]

Direct Examination of H.E. Frech, III

A. The facilities that York has that Memorial Osteopathic does not have for a long time included a CT scanner which is a device that gives very accurate X-ray-type pictures of the inside of the body. It's a very important device.

I understand that now Memorial Osteopathic has one.

The other unique facilities that York has include therapeutic radiology which treats patients by sending in a very focused beam of energy to destroy tumors, and York has —

MR. WEINSTEIN: Objection, Your Honor. I'm wondering whether the witness is testifying or reading.

* * *

[3868a]

BY MR. MARKOWITZ:

Q. Okay. Now, let's go back to where we were, Doctor. You were describing the facilities that were unique to the York Hospital and staff as well as the services that were unique to that institution and its staff.

A. Yes. The first was the CT scanner which was unique for quite awhile, but no longer is.

The second was therapeutic radiology which is an important treatment for tumors.

Then we have open heart surgery.

MR. WEINSTEIN: Objection, Judge. Could we now know what page on the new document that he is reading from?

THE COURT: What are you looking at, sir?

THE WITNESS: Page 9.

MR. WEINSTEIN: Thank you.

THE COURT: You may go ahead, sir.

THE WITNESS: Open heart surgery, cardiac catheterization, renal dialysis, neonatal intensive care, short-term psychiatric care, monitored stroke unit, audiology, burn care, cardiopulmonary laboratory, cardiopulmonary rehabilitation, dental services, — if I can pronounce this —

[3869a]

electroencephalography.

THE COURT: Electroencephalography would be my guess.

MR. LEVIN: That was not a guess, Your Honor, that is it.

THE COURT: We can check it.

THE WITNESS: Family planning, genetic counseling service, pastoral care, pregnancy termination, prosthetic services and speech therapy.

BY MR. MARKOWITZ:

Q. Does the diversity of specialists on the staff of the York Hospital affect its market power?

MR. WEINSTEIN: Objection, Your Honor. I think we should have a definition of what he means by market power, the term. I don't know what it means as he is using it.

THE COURT: What's your view, counsel?

MR. MARKOWITZ: I'll withdraw the question, Your Honor.

BY MR. MARKOWITZ:

Q. What is the effect of the diversity of facilities on the market?

A. Well, the fact that York has many of these facilities that Memorial doesn't, it means for certain types of con-

sumers, York is just a monopolist and they really don't have the option of going to Memorial Osteopathic because it

[3870a]

doesn't have a crucial service.

* * *

[3873a]

BY MR. MARKOWITZ:

Q. What is the effect of health planning laws on physicians who are excluded from the staff of York Hospital? And that can only get onto the staff of Memorial?

A. The health planning laws make it more difficult for those excluded physicians to compete by working at the other hospital and that works by way of making it more difficult for the other hospital to increase its services. Remember, under the health planning rules that we've had for the last few years, the Memorial Osteopathic, in this case, needs permission of the Planning Agency to expand into new areas and it would have to expand in several new areas to match York.

So, the requirement to get permission makes it more difficult for them to complete.

Q. Can that permission be difficult to obtain?

A. Yes. Sometimes it's impossible to obtain.

Q. Why?

A. Well —

MR. WEINSTEIN: Objection, Your Honor. At this point I don't think that there is anything in the documents that he has reviewed that relates to this subject matter. He hasn't even indicated that he has qualifications with repsect to this particular question and whether or not he

[3874a]

is familiar with the local HSA in that area.

THE COURT: I didn't understand it was the HSA that was doing this. Maybe I'm wrong.

Read the last question back.

(Question read)

THE COURT: What has that to do with the HSA?

MR. WEINSTEIN: He already testified, Your Honor, that the permission, as he testified, that the State requires the permission of the local Health Planning Agency known as an HSA, so that's what he's referring to when he's talking about getting permission, or indeed, the State of Pennsylvania that is what he is refer[illegible]eing to. He hasn't indicated any familiarity with the Department of Health in this Commonwealth.

THE COURT: I thought what he was talking about was the admission of a Doctor "X" to a different staff. I don't see that the HSA has anything to do with this at all.

I'll overrule the objection. You may answer the question.

BY MR. MARKOWITZ:

Q. You were answering my question, why.

A. Why is it difficult for the hospital to expand in certain areas, right?

MR. WEINSTEIN: Your Honor, I renew the

[3875a]

objection based on that.

MR. MARKOWITZ: Would you read it back?

THE COURT: Now, wait a minute. I'll sustain the objection.

Go back and read that last question and see — read the last two questions.

(The record was read.)

THE COURT: All right. I did sustain the objection but you may pursue the inquiry.

MR. MARKOWITZ: I'm sorry, I don't understand, Your Honor.

THE COURT: Well, it's very plain to me. I sustained the objection so your last question is not entitled to be answered but you may pursue the inquiry.

MR. MARKOWITZ: Okay, thank you, Your Honor.

THE COURT: Because it's too confused a situation at the moment to try to back up.

BY MR. MARKOWITZ:

Q. Why would this permission be difficult to obtain?

MR. WEINSTEIN: Objection. It's the same question, Your Honor.

THE COURT: What's your view, sir?

MR. MARKOWITZ: If the Court please, I understand the basis of their objection, it goes to the

[3876a]

qualifications. They have stipulated his qualifications. This is a matter properly for cross examination. If he doesn't know what he's talking about, they certainly are able to bring it out on cross.

THE COURT: All right. I'll overrule the objection. You may answer.

THE COURT (Sic): The permission may be difficult to obtain for two reasons. One is the basis idea of this kind of regulation is to make it difficult for hospitals to expand. The idea was that hospitals were expanding too much, too many beds and too many fancy capital goods, fancy kinds of equipment and so on so that the regulation was to save costs by restricting the expansion. So there's a built-in bias in the way the system is set up, and the reason it's set up is to tend to deny hospitals permission to expand.

The other reason that's important for this specific case is that other hospitals are free to object if one hospital wants to expand. On this case, Memorial Osteopathic might like to expand but York Hospital can object to their expansion, say they don't want it to expand, and since York Hospital is a much larger institution, it's likely to have some sway with the local Hospital Planning and regulatory group.

BY MR. MARKOWITZ:

Q. Does this make it more or less important for

[3877a]

members of the Memorial staff, that is, members of the class, to obtain access to York Hospital's facilities and services?

MR. WEINSTEIN: Objection, Your Honor. He has mixed two different concepts, the staff at Memorial Osteopathic Hospital is not identical with —

THE COURT: He's willing to withdraw his question.

MR. MARKOWITZ: You're absolutely right. I remember I switched in mid stream. Let me ask the quesiton again, Your Honor, so it's clear.

BY MR. MARKOWITZ:

Q. Does this make it more important or less important for members of the class to obtain access to York Hospital's facilities and services?

A. It makes it more important.

Q. Why?

A. Because their alternative competitive route of competing through Memorial Osteopathic, is somewhat blocked by the regulations. If it weren't for the regulations, they could compete better through a separate hospital.

Q. Doctor, would specialists at York Hospital be threatened by the admission of osteopathic physicians?

A. Yes.

MR. WEINSTEIN: Objection, Your Honor. I don't know what he means by "threatened". I think that was

[3878a]

perhaps a poor word choice and maybe the question should be rephrased.

THE COURT: What's your view, counsel?

MR. MARKOWITZ: I'll give him, hopefully, a happier term, Your Honor.

THE COURT: All right.

BY MR. MARKOWITZ:

Q. Would specialists at York Hospital be economically harmed by the admission of osteopathic physicians?

A. Yes.

Q. Why?

A. Well, because they would have to then compete with the osteopathic specialists so that it would increase the amount of competition that they would face.

* * *

[3965a]

Cross-Examination of H.E. Frech, III:

Q. Dr. Frech, I would like to go down the list of the services that you, in your report, indicated were unique to York Hospital in the sense that they were not available also at Memorial Osteopathic Hospital.

Can you tell me what you meant in your report by "Pastoral Care"?

A. Well, actually, I can't. That was just taken from a report to the Department of Health and I don't know exactly what they meant by that.

Q. Did you make any inquiry to find out what was meant by that before you concluded that that was something that was not available at Memorial Osteopathic Hospital?

A. No.

[3966a]

Q. Did you make any determination of the extent to which the York County community has pastoral care available to it outside the York Hospital?

A. No. I assume there are plenty of pastors.

Q. But nevertheless you included that as something special that York Hospital has?

A. I just included everything that was on the report and that was checked off by York Hospital and not by Memorial.

Q. Whether you understood what it was or not, you just included it, is that correct?

A. Well, I suppose.

Q. Is speech therapy available in York County outside of York Hospital?

A. I'm sure it is.

Q. Is there anything that prevents Memorial Osteopathic Hospital from having speech therapy as you understand it?

A. I don't believe so.

Q. They just chose not to provide it, is that correct?

A. That's correct.

Q. That is not York Hospital's fault, is it?

A. No.

Q. What about Family Planning, is that a service

[3967a]

that's available outside of York Hospital but inside the York medical service area you talked about?

A. I'm sure it is.

Q. Memorial Osteopathic Hospital could provide it, couldn't it?

A. That's correct.

Q. They just chose not to provide it?

A. That's correct.

Q. And again, that is not the fault of York Hospital as you understand it?

A. That's true.

Q. Would your answer be the same with respect to the other entry just below that of Genetic Counselling Service?

A. Yes.

Q. Would your answer be the same for Dental Services?

A. There I would have to know a little bit more about the regulations under the Health Systems Agency. It's possible that Memorial would have to get permission to install the equipment to provide dental care.

[4433a]

Direct Examination of Ivan Butler, M.D.:

Q. Dr. Butler, who is Mr. Donn Cohen?

THE COURT: I'm sorry, I didn't get that name.

BY MR. LEVIN:

Q. I'm sorry. Who is Mr. Donn, D-O-N-N, Cohen?

A. Donn Cohen is an attorney in York who, at the time, was a member of the Board of the York Hospital and he was President of the York Hospital Board of Directors.

Q. Before the Executive Committee meeting in which you changed your vote, is it true that Donn Cohen told you that he would back you up?

A. I had a conversation with Mr. Cohen before he even saw Dr. Weiss' application in February, end of February, 1977, and that is the only conversation I had with Mr. Cohen, as I recall, regarding the entire incident.

At that time I had told Mr. Cohen that I had a conversation with Dr. Weiss at which time he threatened a lawsuit against the hospital. I mentioned this to Mr. Cohen and his comment, as I recall it, was that for the Executive Committee to proceed into whatever manner they thought was in the best interest of the York Hospital and the patients, and if

[4434a]

a lawsuit were to come, that the Board of Directors would be behind us.

Q. Did Mr. Cohen state, at that time, that he would "back you up"?

A. I cannot swear specifically to those words, but I thing that was the intention of the conversation as I recall it.

Q. After the meeting of the Executive Committee with regard to an application, isn't it a fact that the final word on the admission or non-admission of a physician at your hospital is by the Board of Directors?

A. Yes.

Q. And Mr. Cohen was a member of the Board?

A. Yes.

Q. Mr. Cohen was Chairman of the Board?

A. Yes.

Q. These proceedings were before your committee at the time?

A. You mean the consideration of the application?

Q. Yes.

A. Yes, that was before the Executive Committee.

Q. And he discussed with you in words or substance that he would back you up?

A. You keep using the term "back me up". I'm

[4435a]

not sure if they were the words that were used. I think the substance of the conversation with Mr. Cohen was as long as we acted in the best interest of the York Hospital, that the Board of Directors would simply be behind us. That was their only concern.

* * *

[4501a]

Direct Examination of Paul Keiser:

Q. Now you mentioned that the By-Laws were changed in December of 1976.

A. Medical staff By-Laws, yes.

Q. Yes. When was the Charter changed to allow osteopathic physicians to gain entry into your facility.

A. I believe that was late in 1974.

Q. So the charter was changed in 1974 to allow osteopathic physicians to come into your facilities, and the By-Laws weren't changed until December of 1976. Mr. Keiser, can you tell us why there was that great delay — I characterize it as a delay — between the time that the Charter was changed and the time the By-Laws were finally changed.

A. Yes, I will be glad to tell you that it is my impression that when this occurred in 1974 after careful deliberation on the part of the Board of Directors to effect this change, an overall change in the Charter, this was not

[4502a]

just to allow osteopaths to practice at the hospital, but this was from major changes in the Charter itself speaking to the

fact that it would allow that allopathic physicians health care providers.

There was a period of time when this was discussed and deliberated by the medical staff.

The Board of Directors in enacting the change of the Charter felt it was very important that the change of the Charter would not indicate to the staff that they had to make a change in the By-Laws but that it is something that the medical staff themselves should evaluate and make a decision.

Therefore it was a long period of time, in terms of the period of two years if you call that a long period of time, there was a debate over the language that would be used. There was careful consideration that the final change would be equitable, fair, and above all would continue to guarantee that a high quality of patient care would be provided at the York Hospital.

[5056a]

Direct Examination of Robert P. Inman:

Q. Dr. Inman, based upon your discipline, do you have an opinion, to a reasonable certainty, as to what the real product or product markets may be in this case?

A. Yes.

Q. What is that opinion?

A. It is my opinion that the analysis of product markets requires first, a very careful definition of what the product is that is being provided, and then secondly, a consideration of what the relevant competitors would be in the provision of that product.

The health care market is an extremely complicated market and involves many products. Characterize it is simply health care, I think would be very misleading. In the instance we're discussing, the provision of services by York Hospital and by family practice physicians, such as

[5057a]

Dr. Weiss, we are considering really three levels of products.

The first level called the primary care or first level care is generally provided by a family practice physician or a general practice physician in the physician's office or on an outpatient basis. It may involve a short stay in the hospital, but usually it's a fairly simple procedure if it does, in fact, involve hospitalization.

There is a second level of care called secondary care and that will involve for the most case, hospitalization and will involve the use of specialists, an internist, a general surgeon, OBGYN physicians. It will involve the use of a specialist, perhaps in consultation with a primary care physician.

THE COURT: Sir, you said OBGYS. I think I know what that is. I think it would be well if you would tell some of the members of the jury. They may not know it.

THE WITNESS: Obstetrics and gynecology.

Then there is a third level of care in the literature and in the professional hospital administration literature called tertiary care, and it involves for the most part the intensive care treatment of patients. It's the most sophisticated kind of treatment. It will involve radiation therapy for complicated cancers, chemotherapy for complicated cancers, intensive care treatment, open heart surgery. It is the most sophisticated kind of medical care and will involve

[5058a]

what are called sub-specialist physicians.

In the definition then of products in the health care market, one wants to be very careful and distinguish, I believe, these three different types of products.

[5138a]

Cross examination of Robert Inman, Ph.D.:

Q. Does York Hospital, in your estimation, provide primary care kinds of services?

A. Yes, it does.

Q. Does Memorial Osteopathic provide primary care services?

A. Yes, it does.

Q. They overlap. They are competitors to that extent?

A. That is right.

Q. Does Memorial Osteopathic Hospital, in your opinion, provide secondary level services?

A. Yes.

Q. Does York Hospital provide secondary level?

A. Yes.

Q. So they are competitors to that extent?

A. Yes.

Q. And how about the tertiary area, does Memorial provide the tertiary level of services?

A. No.

Q. Does York?

A. Yes.

[5685a]

Charge to the Jury:

And it is the general rule that the acts of the agent are the acts of the corporation. Therefore the Sherman Act does not prohibit an agreement, combination or conspiracy which consists merely in the fact that the officers and other agents of a single defendant corporation, or the single defendant corporation, did their day to day jobs of formulating and carrying out its policy.

York Hospital is a corporation and as such it can act only through its employees, officers or representatives. The York Hospital does not violate the Sherman Act if it exercises its rights to its officers and agents, which is the only medium through which it can possibly act; likewise the corporation cannot conspire with its unincorporated division here, the medical and dental staff of the York Hospital.

Thus I instruct you that York Hospital and the Medical and Dental Staff of York Hospital must be regarded by you as a matter of law as a single entity which cannot conspire with itself.

[5758]

Defendants' Objections to the Court's Charge:

MR. WEINSTEIN: Perhaps this may be the last one your Honor.

Your Honor charged that if the jury concluded that York Hospital has unique facilities and market power, then they were to find that there was an abuse of monopoly if Plaintiff and Plaintiff class were denied access to these facilities unfairly or unreasonably.

[5956a]

Defendants' Exhibit No. 10

STATEMENT OF REASON FOR DENIAL OF APPLICAITON FOR MEDICAL STAFF PRIVILEGES OF MALCOLM WEISS, D. O.

This statement is presented pursuant to Article III, Section 8, of the By-Laws of the Medical and Dental Staff of York Hospital, York, Pennsylvania, concerning the recommendation of the Executive Committee of York Hospital Medical Staff at its meeting on April 19, 1978, to deny the application of Malcolm Weiss, D.O. for membership on the Medical Staff of the Hospital.

The Executive Committee made a complete review of all available files including confidential information received through correspondence, interviews held with Dr. Weiss and other data, and after due consideration and in light of the standards of the Hospital and the Medical Staff as set forth in the By-Laws, the Executive Committee reached its recommendation of denial of Dr. Weiss' application for the following reasons:

I.

It appears that Dr. Weiss is unable on occasion to conduct himself in a manner that is conducive to harmonious relations with practitioners and Hospital personnel and conducive to high quality patient care. For example:

(a)

The Committee was informed that Dr. Weiss' conduct as a member of the staff at Memorial Osteopathic Hospital in York, Pennsylvania, was at times abrasive and uncooperative with other members of that hospital

[5959a]

Defendants' Exhibit No. 12

YORK HOSPITAL MEDICAL STAFF
BYLAWS
1977

[5960a]

PREAMBLE

Recognizing that an organized, self-governed Medical & Dental Staff, subject to approval by the Board, is in the best interest of the individual patient and the community, the physicians and dentists associated in practice in the York Hospital, York, Pennsylvania, hereby express the intent to organize themselves in conformity with the Bylaws and Rules and Regulations hereinafter stated.
Notice: Attention is directed to Article XI, Section 2, b, below.

[5961a]

b. The Credentials Committee shall review the application as outlined in Article III, Section 6d below, and submit the application together with its recommendations, to the Executive Committee of the staff. The Executive Committee shall evaluate the application in the light of Article III, Section 9, of these Bylaws, and shall submit the application, with its recommendation, to the Board of Directors for its definitive action as to appointment to the staff.

c. In the event that the applicant for staff membership is dissatisfied with the recommendation of the Credentials or Executive Committees of the staff, or with the action of

the Board, he may appeal the action, within thirty (30) days of his notification of the action, to the Judicial Review Committee and be entitled to all rights and appeal as outlined in Article III, Section 8.

[5962a]

Section 8 — Appeal Mechanism Following Suspension or Revocation of Privileges

In all cases in which a member's appointment has been recommended by the Executive Committee of the Medical Staff for suspension or revocation, or in which the request for increased privileges has been recommended for denial, or the existing privileges have been recommended for curtailment or limitations imposed, the applicant may request a hearing in order to seek reconsideration of the case on the basis that the decision was in error, unreasonable, arbitrary or capricious. Such a request shall be made to the Secretary of the Medical Staff in writing within ten days after he has received notice of the recommendation or action which he seeks to have reconsidered.

[5963a]

When a hearing is requested, a JUDICIAL REVIEW COMMITTEE shall be appointed by the Executive Committee of the Medical-Dental Staff, consisting of five (5) members of the active Medical-Dental Staff who have not taken an active part in the consideration of the matter contested.

Conduct of Hearing

All evidence shall be taken on oath or affirmation and a transcript recorded of the testimony and evidence submitted.

Each party shall have these rights: To call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter that was not

[5964a]

covered in the direct examination; to impeach any witness regardless of which party first called him to testify, and to rebut the evidence against him. If respondent does not testify in his own behalf, he may be called and examined as if under cross-examination. The authority to permit or exclude legal counsel shall be left with the Judicial Review Committee provided, however, that if legal counsel for the staff member is excluded, there shall be no legal counsel for the Hospital and Medical-Dental Staff present.

The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any commonlaw or statutory rule which might make improper the admission of such evidence over objections in civil actions.

In reaching a decision, official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the Judicial Review Committee's special field, and of any facts which may be judicially noticed by the courts of this state. Parties present at the hearing shall be informed of the matters to be noticed and those matters shall be noted in the record. Any party shall be given a reasonable opportunity, on request, to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the Judicial Review Committee.

After the hearing, the Judicial Review Committee shall make a report and recommendation in writing to the Executive Committee of the Medical-Dental Staff

[5965a]

and to the Board. The report shall state the findings as to specific matters based upon the evidence and may recommend affirmation, modification or rejection of the original

recommendations of the Executive Committee of the Medical-Dental Staff.

[5966a]

Section 9 — Qualifications for Membership

A. *Education* —

3) Appointment to the Associate or Active Staff shall require postgraduate study in the specialty concerned sufficient to qualify the applicant at some time for examination by the appropriate American Board of Medical Specialties, or require professional training and professional credentials equivalent thereto.

[5967a]

b. *Other factors* — Considerations for appointment to the Staff shall be reviewed by the Executive Committee on all of the bases above and, in addition, on:

1) *Experience* — Should be consistent with that level to assure competence in the type and level of appointment sought.

2) *Character* — Non-professional as well as professional moral and ethical character should be carefully considered, and reviewed when necessary, on a continuing basis concerning reappointment. Specifically, criminal convictions or entry of a pleas of guilty or nolo contendre of a felony shall bar appointment or continuing membership. This shall not include conviction for which sentence has been served.

3) *Loyalty* — An applicant who accepts a position on the Staff shall have sufficient loyalty and pride in the appointment to put forth every effort toward the continuing development of efficient professional services, good teaching programs, and to support the Officers of the Staff, the President, and the Board of Directors in the proper conduct of the institution.

4) *Performance* — The willingness, consistency, and spirit with which the Staff member conducts his professional patient care to assure a high quality of care, and professional teaching and administrative duties, as requested by the administrative organization of the Staff shall constitute a subject for review by the Credentials Committee and the Executive Committee in relation to recommendations to the Board concerning reappointment.

[5968a]

c. *The Active Staff* — shall:

1) Consist of staff members who are certified by the appropriate American Board of Medical Specialties or with professional training and professional credentials equivalent thereto to qualify the applicant at some time for examination by the appropriate American Board of Medical Specialties.

[5969a]

e. *The Assistant Staff* — shall:

1) Consist of staff members who do not have sufficient professional training and professional credentials equivalent thereto to qualify them for Active or Associate Staff membership, but who have displayed consistent clinical interest in a department and desire appointment within that Department.

2) Have admitting privileges limited in that automatic consultations would be required from any appropriate member of the Active or Associate Staff: this requirement could be suspended at the discretion of the Department head of the Department to which the member is applying at any time during his provisional period.

5) Not eligible for Associate or Active Staff membership unless their is subsequent compliance with the required educational requirements for these categories.

[5970a]

ARTICLE XII — ADOPTION

These Bylaws together with the appended Rules and Regulations, when adopted at any regular meeting of the Medical Staff, shall replace any previous Bylaws and Rules and Regulations, and shall become effective when approved by the Board of Directors of the hospital. They shall be, when adopted and approved, equally binding on the Board of Directors and the hospital Medical Staff.

[5979a]
DEFENDANT'S
EXHIBIT
27

In re
MALCOLM WEISS, D.O.
and
YORK HOSPITAL
YORK, PA

HEARING PROCEDURE

The Hearing is described in general at Article III of the current York Hospital Medical Staff Bylaws. However, the following matters are noted to emphasize and expand upon the aforementioned provisions.

A. The Chairman of the Judicial Review Committee shall preside at the Hearing and shall:

(1) Insure that both physician and hospital will each have a reasonable opportunity to be heard;

(2) Maintain decorum;

(3) Determine the order of procedure during the Hearing, and

(4) Make rulings on questions or objections and as to the admissibility of information.

B. Either side may at its option be represented by legal counsel of its choice.

C. A record will be kept of the Hearing by one of the following methods: a shorthand or stenographic reporter, a tape recorder, or summarized minutes of the Hearing. The cost of the shorthand or stenographic reporter shall be borne by the hospital. The physician may, at his option and cost, order copies of the transcript from the reporter.

D. Both sides shall each have the following rights:

(1) To call and examine witnesses;

(2) To introduce exhibits and documentary evidence;

[5980a]

(3) To cross-examine any witness on any matter relevant to the issues and to rebut any evidence.

E. The hearing will not be conducted according to the technical rules of law relating to examination of witnesses or the presentation of evidence. Any relevant evidence shall be admissable if it is the sort of evidence which responsible persons are accustomed to rely upon in the conduct of serious affairs.

F. Both the physician and the hospital are entitled to submit memoranda of points and supporting authorities to the Judicial Review Committee.

G. The Hearing shall be closed to the public. Only the physician and the hospital, their counsel, the Judicial Review Committee and the recorder will be present throughout the entire proceeding. Witnesses will be present in the hearing room only during the presentation of their testimony.

H. The Chairman, acting for the Judicial Review Committee, may adjourn the Hearing and reconvene the

same at the convenience of the participants without special notice. Upon conclusion of the presentation of oral and documentary evidence by each side and questioning by the Judical Review Committee, the Hearing shall end. The Judicial Review Committee shall thereafter, outside the presence of other persons, conduct its deliberations and render a report and recommendations.

I. The report, and recommendations of the Judicial Review Committee shall be based on the evidence produced at the Hearing. The Judicial Review Committee may postpone its deliberations until it receives the transcript or record of the Hearing. However, the Judicial Review Committee should make every effort to render its report and recommendations as expeditiously as possible.

J. Either party may appeal the final action of the Executive Committee as reviewed by the Judicial Review Committee and its recommendations to the Board of Directors within thirty (30) days after receipt of action of the Judicial Review Committee.

K. The proceedings before the Board of Directors shall be in the nature of an appellate review and shall be based on the hearing record and the report and recommendations of the Judicial Review Committee and the final recommendation of the Executive Committee. Each side shall have the right to present written and/or oral argument in support of his position on appeal.